

Page 1

1 STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 08-13555-JMP

5 In the Matter of:

6

7 LEHMAN BROTHERS HOLDINGS INC., et al.,

8

9 Debtors.

10

12

13 | United States Bankruptcy Court

14 One Bowling Green

15 | New York, NY 10004-1408

16 April 25, 2013

17 | Page

18

19 | B E F O R E:

20 HON. JAMES M. PECK

21 U.S. BANKRUPTCY JUDGE

22

23

24

25 ECRO: TIFFANY

Page 2

1 HEARING re Doc #36007 - Four Hundred Third Omnibus Objection to
2 Claims

3

4

5 HEARING re Doc #34303 - Plan Administrator's Omnibus Objections
6 to Claims filed by Deborah Focht

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25 Transcribed by: Theresa Pullan

Page 3

1 A P P E A R A N C E S :
2
3 WEIL, GOTSHAL & MANGES LLP
4 Attorneys for Debtors
5 767 Fifth Avenue
6 New York, NY 10153
7
8 BY: ZAW WIN, ESQ.

9
10
11 TELEPHONIC APPEARANCES:
12
13 DEBORAH E. FOCHT
14
15
16
17
18
19
20
21
22
23
24
25

1 P R O C E E D I N G S

2 THE COURT: Be seated please. I understand that we
3 have a creditor participating by telephone. I just want to
4 verify for my purposes that the telephone hookup is working,
5 because I heard that there was a volume problem earlier. It's
6 fine? Okay. Thank you.

7 MR. WIN: Good morning, Your Honor, Zaw Win, Weil
8 Gotschal and Manges for Lehman Brothers Holdings Inc. The
9 first matter on the agenda is the Four Hundred Third Omnibus
10 Objection, which is a no liability claims objection, it's
11 listed at ECF number 36007. And it seeks to disallow and
12 expunge certain claims for benefits and employment related
13 compensation. The debtors received two formal and one informal
14 response to this objection. The response of Barry J. O'Brien,
15 whose claim is claim number 32520 and the objection is listed
16 at ECF number 36386, objects to all the relief sought and has
17 been adjourned without date.

18 The second response is a response of Wendy M. Uvino,
19 she has claim number 4770, and the response is listed at 36760,
20 objects to the relief sought only with respect to a portion of
21 Ms. Uvino's claim. After consultation with her counsel, she
22 has agreed to the disallowance and expungement of a \$91,000
23 portion of her claim, and the response with respect to the
24 remaining portion of her claim has also been adjourned.

25 In addition to those two, the debtors were contacted

Page 5

1 informally by counsel to claimant William Broadbend (phonetic)
2 whose claim is claim number 65126. He filed a claim in the
3 amount of \$1,870,078.90, and the motions filed requested that
4 \$1,070,000 portion of that claim be disallowed and provided
5 that an \$800,078.90 of the claim was not subject to the motion.
6 Upon consultation with his counsel, the exhibit proposed order
7 was revised to reflect the disallowance of a million dollar
8 portion of the claim and to provide that an \$870,078.90 portion
9 of the claim is not subject to the objection. With the
10 incorporation of that revision, we understand that Mr.
11 Broadbend does not dispute the relief requested.

12 So we'd ask that the order only be entered only to
13 the remaining portion of the motion with the first two claims
14 being adjourned and adjustment to the third claim.

15 THE COURT: Fine, with that understanding, I'll enter
16 the order.

17 MR. WIN: The last matter on the agenda today is the
18 Plan Administrator's Omnibus Objection to claims filed by
19 Deborah Focht. The objection is listed at ECF Number 34303.
20 Ms. Focht filed two responses to the Plan Administrator's
21 Objection. The first one is listed at ECF Number 35026 and the
22 second is listed at ECF Number 36165.

23 The plan administrator has also filed a reply to Ms.
24 Focht's responses which is listed at 36737 and that reply
25 included a declaration of Daniel Glanz, Mr. Glanz is in Court

Page 6

1 today.

2 The objection relates to five proofs of claim, claim
3 numbers 34380 and 42914 which are against BNC Mortgage, 34381
4 which is against LBHI, 42915 which is against Lehman Brothers
5 over the counter derivatives, and 42916 which is against Lehman
6 Brothers derivative products.

7 As set forth in our papers, the Plan Administrator
8 has identified substantive and procedural defects to each of
9 Ms. Focht's claims. Additionally, the Plan Administrator has
10 reserved its rights to object to Focht's claims based on other
11 defects that were not included in these papers just out of a
12 desire to keep the papers as simple as possible at this point.
13 In the interest of clarity, I propose to address three separate
14 issues separately giving Ms. Focht an opportunity to respond to
15 each issue before moving on to the next. Does that work for
16 the Court?

17 THE COURT: I'm sorry, what was the question?

18 MR. WIN: I'm proposing to address three issues
19 separately.

20 THE COURT: Yes, that's fine.

21 MR. WIN: Okay. Those issues are the timeliness of
22 Ms. Focht's claims; and then second Ms Focht's derivative
23 contract and insurance based claims; and third, Ms. Focht's
24 loan origination claims. Starting out with the timeliness
25 issue --

Page 7

1 THE COURT: Before we get into the substance of the
2 argument which you plan to present in three parts, I just want
3 to verify that Ms. Focht is on the line and can hear what's
4 being said, and as a result will be in a position to make
5 responses after you've made your argument. So I'm just
6 checking to make sure that she's here and actively
7 participating telephonically.

8 MS. FOCHT: [indiscernible] can you hear me?

9 THE COURT: I can barely hear you. I think we have,
10 I'm glad I asked because we have something of a problem. Just
11 one second. Try again.

12 MS. FOCHT: Can you hear me now?

13 THE COURT: Try again.

14 MS. FOCHT: Again, can you hear me now?

15 THE COURT: I can hear you now, but I must tell you
16 it's faint. This is like a Verizon commercial. Do you want to
17 try again just for testing purposes?

18 MS. FOCHT: Yes. Can you hear me now?

19 THE COURT: I can hear you but you are faint. I
20 think what, and this is certainly not your fault, but I'll
21 simply note that given the economies of having to travel in
22 person to deal with a matter of this sort, I understand why
23 you're participating by telephone. But it is almost by
24 definition less effective than being present in person in the
25 courtroom, and we'll deal with it. But I'm letting you know

Page 8

1 even before we get into the substance that from a technical
2 perspective, you're not coming through loud and clear, at least
3 not uniformly so. But let's proceed with the argument. My
4 real question was whether you can hear us clearly so that
5 you're in a position to hear counsel's argument and then be in
6 a position to respond to it.

7 MS. FOCHT: Yes, I can hear very good.

8 THE COURT: Okay. Let's proceed.

9 MR. WIN: Okay, so getting back to --

10 MS. FOCHT: May I ask a question?

11 THE COURT: Yes, you may ask a question.

12 MS. FOCHT: Are you Judge Peck?

13 MR. WIN: She asked if you were Judge Peck.

14 THE COURT: Oh yes, I am.

15 MS. FOCHT: Okay. And Michael, is this the name of
16 the attorney?

17 MR. WIN: No, my name is Zaw Win, Z-A-W last name
18 Win, W-I-N.

19 MS. FOCHT: Okay, thank you.

20 THE COURT: Sir, please proceed with your argument.

21 MR. WIN: Okay. So the first issue that I'd like to
22 discuss is the timeliness of Ms. Focht's claims. As the Court
23 knows, the bar date in this case was established for September
24 22nd, 2009 at 5:00 p.m. According to the time stamps inserted
25 by Epic onto the claims, two of Ms. Focht's claims were

Page 9

1 received within one day of the bar date, those are claim
2 numbers 34380 and 34381. My administrator is not objecting to
3 the timeliness of those claims at this time.

4 The remainder of Ms. Focht's claims, 42914, 42915 and
5 42916 were received by Epic on October 23rd which is almost a
6 month after the bar date. Nothing in Ms. Focht's papers have
7 established any basis for excusable neglect that would justify
8 the late filing of Ms. Focht's claims. In addition, it is
9 clear that Ms. Focht had actual notice of the bar date because
10 she did file two claims that were nearly timely. So her
11 arguments about notice of the bar date are also similarly
12 unavailing. And because she filed those two claims that were
13 basically on time, there's really no reason that she couldn't
14 have filed the other three claims at the same time. So the
15 plan administrator would ask that the Court disallow claims
16 42914, 42915 and 42916.

17 THE COURT: Okay. Ms. Focht, let's focus
18 particularly on this procedural question. And a procedural
19 question is limited to these three claims that were filed about
20 one month after the bar date. I have previously issued rulings
21 in this case and a written opinion dealing with the strict
22 application of the bar date to all claimants. I'm not
23 suggesting that you need to review that opinion, but it does
24 reflect this Court's view as to the importance of the bar date
25 particularly in a case as massive as the Lehman Brothers

Page 10

1 bankruptcy cases. So I'd like you to comment and please speak
2 up as loudly as you can for purposes of not only my ability to
3 hear but also your ability to be effectively recorded on the
4 transcript of today's hearing. And explain if you can the
5 reason that these three claims were filed approximately one
6 month after your initial two claims. That's I think an
7 important questions for me to have answered.

8 MS. FOCHT: I'd like to point out that in the
9 beginning I wasn't really receiving anything and I didn't
10 understand what was going on because I never had had anything
11 to do with Lehman Brothers as far as I ever knew and that while
12 the battle was going down in the state court, I had asked for
13 discovery. And I also asked for discovery from BNC before they
14 went into the bankruptcy court. And all I was told was no, or
15 I can't or [indiscernible] motions to compel, and as time went
16 by information was only trickling in. The very first time I
17 found out about Lehman Brothers was on with the letters Leh on
18 one of my exhibits, Your Honor, and I attached that to my
19 creditor's amended response to the Plan Administrator's Omnibus
20 Objections. On it all I could go by was those three letters
21 Leh. At that time that was probably way after [indiscernible].
22 At any rate, I still wasn't getting discovery, and later
23 towards the end of the year which was around the time that I
24 was filing that was the bar date, is when I heard about this
25 [indiscernible] from the law professor [indiscernible] he was

Page 11

1 discussing the matter with derivatives and discussing credit
2 default swaps. And the reason why I put that in there, Your
3 Honor, was because I could not understand what was going on,
4 why these people were attacking me so much down here, and there
5 had to be a reason, it made no sense. I already let them know
6 that they were collecting on the wrong account, they would not
7 give me discovery, a lot of the discovery until after I already
8 filed my claims into your court. And some of that discovery
9 was false, was showing two different properties as I've been
10 saying all along. Now I'd like to object to the plan, the
11 Plan Administrator's reply that was given to me like two days
12 ago because --

13 THE COURT: Can I just break? I don't mean to break
14 in, but we really need to focus on the question of why these
15 three claims were filed one month after the initial two claims.
16 That's my question. This has nothing to do with discovery. It
17 has to do with whether or not you have an excuse that is
18 legally sufficient to explain why certain claims were filed
19 late. And it appears that the first two claims were filed
20 with knowledge that there was a bar date. I'd like a yes or no
21 answer to the following question. Did you know that there was
22 a bar date? That's a yes or a no.

23 MS. FOCHT: No, Your Honor. As soon as I found out
24 about it, I worked on it, I rushed it through and I eventually
25 had to amend it because [indiscernible].

Page 12

1 THE COURT: I'm sorry, I didn't understand your
2 answer. I want it to be a yes or a no. The question is, did
3 you know that there was a bar date.

4 MS. FOCHT: No, Your Honor.

5 THE COURT: Okay, thank you. And then the question
6 is, why did you not file claims 42914, 42915 and 42916 prior to
7 the bar date?

8 MS. FOCHT: Your Honor, that was because I was
9 unaware of the other names that they had listed as
10 subsidiaries, and like I said I am unfamiliar with bankruptcy
11 proceedings.

12 THE COURT: Okay. Do you want to respond?

13 MR. WIN: Yes, I mean with due respect I find the
14 answer implausible. I mean she must have gone on the Epic
15 website to download the proof of claim form, and on the Epic
16 website was a list of all of the debtors. So all of that
17 information was available to her when she filed the first two
18 claims, which as we've said were within one day of the bar date
19 and which we're not objecting to on the basis of timeliness at
20 this point. She also attached to her proofs of claim
21 correspondence that she had with Epic in connection with the
22 filing of the first two claims which also suggests that she was
23 aware that there was a timeliness issue.

24 And I guess the third thing is that the legal
25 theories that she's asserted in the three claims that we are

Page 13

1 asserting are late, are identical to the legal theories that
2 she asserted in the two claims that were timely. So really the
3 only difference between the claims that were filed within a day
4 of the bar date and the claims that were filed a month late are
5 that for two of the claims she added additional debtors, Lehman
6 Brothers OTC and Lehman DP. And that information, all that
7 information was available to her and could have been included
8 in claims filed within, at the same time as the first two
9 claims. So there's really no reason that I can think of that
10 she couldn't have filed all of her claims at the same time she
11 filed claim numbers 34380 and 34381.

12 And I guess the third thing is she mentioned parties
13 attacking her in Florida, and I'd just like to point out that
14 similar to many of her other allegations, those parties are not
15 before this Court, they're third parties, the parties that
16 acquired the loan after BNC sold it and they were not
17 controlled by Lehman and not doing Lehman's bidding.

18 THE COURT: Okay. Ms. Focht, do you have any further
19 comments with regard to the timeliness of these three claims?

20 MS. FOCHT: Yes, Your Honor. I would like to
21 reiterate that I'm not familiar with the bankruptcy procedures.

22 THE COURT: If I could just interject. Your lack of
23 familiarity with bankruptcy procedure is irrelevant to the
24 question that I proposed to you because you had sufficient
25 knowledge of bankruptcy procedure to file the earlier two

Page 14

1 claims which were a day late, but nonetheless reflected an
2 awareness that there was a date in the case that mattered. And
3 you acknowledged that you were aware of that in my earlier
4 question. Correct?

5 MS. FOCHT: Yes, Your Honor, I would like to add some
6 more please.

7 THE COURT: This is a matter of fundamental case
8 administration in every bankruptcy case, bar dates matter, and
9 there are adverse consequences to creditors that fail to file
10 their claims on or before the bar date. It is possible to
11 argue credibly that a one month delay is excusable due to
12 excusable neglect, but it becomes almost impossible to credibly
13 make that argument when claims are filed in recognition of the
14 bar date a month before the three claims that we're now talking
15 about.

16 And so I conclude based upon our discussion which I
17 am treating as the functional equivalent of an evidentiary
18 record, that Ms. Focht had an awareness of the bar date,
19 something which she admitted in this telephone conversation and
20 attempts to explain the delay in filing the three claims
21 presently being discussed, 42914, 42915 and 42916, on the basis
22 of being unsophisticated in bankruptcy matters generally and
23 being somewhat confused. I find that that is not a sufficient
24 reason to excuse the late filing of these three claims in light
25 of the fact that substantially similar claims were filed one

Page 15

1 month earlier against different parties. Moreover,
2 particularly with respect to LBOTC and LBDT, there is zero
3 nexus between the facts alleged and the proof of claim and
4 these debtors. So that even if we were to deal on the merits
5 with these claims and ignore the fact that they are untimely,
6 it is highly likely that I would find that there is no right to
7 payment in any event.

8 For that reason, the claims are all disallowed as
9 untimely and we'll proceed to deal with claims 34380 and 34381.

10 MR. WIN: Thank you, Your Honor. Moving on to claim
11 34381, this was a claim that was filed against Lehman Brothers
12 Holdings, Inc. As far as I can tell, Ms. Focht's basis for
13 this claim is an allegation that LBHI held some kind of an
14 insurance policy or derivative contract that was designed to
15 pay LBHI, according to Ms. Focht, 3 million upon default of Ms.
16 Focht's loan. As set forth in our papers, the debtors have not
17 been able to identify, and Ms. Focht doesn't identify, any
18 insurance policy or derivative contract that was directly
19 related to the loan. And more importantly perhaps, even if
20 such an insurance policy derivative contract did exist, Ms.
21 Focht doesn't allege any basis that would establish a right to
22 payment for her from the proceeds of such insurance policy or
23 derivative contract. So she's failed to establish a prima
24 facie case for any right to payment in connection with this
25 claim, or really even any connection between herself and these

Page 16

1 alleged financial instruments that LBHI may or may not have
2 held at the time of bankruptcy.

3 THE COURT: Is that argument limited to the claim
4 against LBHI 34381?

5 MR. WIN: It would also be applicable to the claims
6 against LBDT and LBOTC, but as I understand the Court has
7 already disallowed those claims. At this point it would only
8 apply to the remaining claim against LBHI.

9 THE COURT: And you're not making an argument at this
10 moment with respect to claim 34380 against BNC?

11 MR. WIN: My understanding, and again it's a little
12 hard from the pleadings to specifically identify which claims
13 Ms. Focht is asserting against which debtor. but the way I
14 understand her argument is that the claims against LBHI are
15 related to the insurance policy and the derivative contract,
16 and the remaining claims that relate to the origination of the
17 loan are against BNC. It may be that that's not her intent,
18 but based on, you know, our good faith reading of her papers,
19 that was the conclusion that we drew.

20 THE COURT: Okay. Let's look for an explanation from
21 Ms. Focht herself. The claim against LBHI which we're now
22 discussing appears to be a claim based upon an insurance
23 contract or a derivatives contract. Is that right?

24 MS. FOCHT: Yes it would be also due to the fact that
25 there was a fraudulent transfer and fraudulent taking of the

Page 17

1 \$109,000 that they took from me. And I put that in as an
2 exhibit under my amended response to the plan, objections.

3 THE COURT: If I could just ask a very, very basic
4 question, and if you could answer it in the simplest way that
5 you can, why do you think you have any claims against LBHI
6 inasmuch as you did not have any dealings with LBHI of any
7 sort?

8 MS. FOCHT: Your Honor, I was just explaining that
9 the exhibit shows that Lehman Brothers took the funds, \$109,000
10 from me, but I did not receive this until after, after I had
11 filed my original claim. The only thing that I could base this
12 on is I was told to go in the Lehman Brothers because like I
13 said Leh was on the mortgage and that's all I had at that time.
14 And right now they're also sending me a new reply which I
15 wanted to object to because I did not receive this in time, it
16 just shows further inconsistencies with discovery. So that was
17 my reason for putting in my statement [indiscernible] I needed
18 discovery in order to amend my motion and my claims properly
19 [indiscernible] before I could even start my case. So I don't
20 know how else to do this without the record, so my request was
21 for discovery and I haven't received it, I haven't received it.

22 THE COURT: Well, according to the papers that I have
23 reviewed that have been filed in response to your opposition to
24 the expungement of your claims, based upon a review an internal
25 review that I gather is supported by a witness here.

Page 18

1 MR. WIN: That's correct.

2 MS. FOCHT: Your Honor, that's the one I'm objecting
3 to.

4 THE COURT: I'm just in the middle of speaking, so
5 for record purposes, let's just let me finish. And then you'll
6 have a courteous opportunity to say what you need to say in
7 response. Based upon the assertions made by a responsible
8 witness from the Plan Administrator, there are no documents
9 that are responsive to your general request, and so even if you
10 were to formally pursue discovery, the answer would be the same
11 and there is a declaration which has been submitted and the
12 witness who provided that declaration is in court today. The
13 only question I suppose I would ask and this is a very
14 difficult matter to handle with you on the telephone speaking
15 in a manner that is still in my view quite faint relative to
16 the other volume levels of people who are appearing live in
17 Court, and that would be for Mr. Glanz to come to the podium
18 and explain in his own words the content of his declaration
19 which has been submitted in support of the reply. It's a
20 declaration dated April 22, 2013 consisting of some 18
21 paragraphs. But I don't know if you've seen that. And even if
22 you have seen it, it may be that it would be useful for him to
23 explain the substance of that declaration. And if you have
24 questions concerning his statements, you can ask those
25 questions right now, and he can then further respond. That way

Page 19

1 in effect, you'll be getting some of the discovery that you
2 claim to require. Would that be all right?

3 MS. FOCHT: Excuse me, Your Honor. Is there a time
4 span that you're supposed to provide me before I respond?

5 THE COURT: I'm sorry, I'm not understanding you.

6 MS. FOCHT: I just received this in the mail, so I
7 didn't get a chance to really carefully go through it, all I
8 saw was one line across the sheet here just saying
9 [indiscernible] I mean it doesn't really have a document to it,
10 it's just typed in information so I don't have any transfer
11 information on what happened at all.

12 THE COURT: Ms. Focht, the issue here is whether you
13 have a viable claim against LBHI, that's the issue.

14 MS. FOCHT: Okay.

15 THE COURT: And we are going to deal with that today.
16 And we have a witness who is going to provide information to
17 you concerning the discovery that you have requested in a
18 variety of informal ways in the context of this claim objection
19 proceeding. And I'd like you to have that information so that
20 you can be satisfied that in fact there are no documents that
21 relate to an insurance contract or derivative contract
22 applicable to your mortgage from BNC. I'm going to ask Mr.
23 Glanz to now make a presentation for your benefit, because I
24 can read the declaration, but I think it would be useful for
25 him to explain what that declaration consists of and for you to

Page 20

1 have an opportunity if you wish to avail yourself with that
2 opportunity to ask him questions about his statements made to
3 me. Is that all right?

4 MR. WIN: That's all right, Your Honor. Would it be
5 helpful if I asked him questions to elicit the testimony that
6 he included in his declaration?

7 THE COURT: That might be a good way to develop it on
8 the record. And if Ms. Glanz (sic) wishes to ask further
9 questions, that's fine. But in this manner, she'll be able to
10 hear for herself what Mr. Glanz has to say in response to your
11 questions. Why don't we do that? And Mr. Glanz, you can sit
12 in the witness stand and we can proceed in that manner.

13 TESTIMONY OF MR. GLANZ

14 BY MR. WIN:

15 Q. Can you please state your name for the record?

16 A. Daniel Glanz.

17 Q. And can you please give us your title at Lehman Brothers?

18 A. Vice president.

19 Q. And can you give us a little bit of background of how long
20 you've worked at Lehman Brothers and what your job is?

21 A. Sure. I've been with Lehman since September of 2001. I
22 was, I've been working in the mortgage area of Lehman's since
23 then. Prior to bankruptcy, I was working with the information
24 technology area at Lehman Brothers where I was responsible for
25 one of the technology platforms, the platform I refer on my

Page 21

1 declaration is called Hold On Tracking (phonetic), and post
2 petition, I've been working in the group responsible for the
3 wind down and managing of the assets remaining in the mortgage
4 business.

5 Q. What does the Hold On Tracking system do?

6 A. The Hold On Tracking platform was built to be the system
7 of record to maintain a record of all the loans that Lehman
8 [indiscernible] purchased and either held or sold and it was a
9 place for Lehman to keep track of the loans that it owned, get
10 regular updates on their performance and ultimately track if
11 they were sold, that sale of those mortgages.

12 Q. So is it fair to say that Lehman business people depended
13 on information that was contained in the Hold On Tracking
14 system to show things like sales or assignments of loans out of
15 the estate to third parties?

16 A. Yes.

17 Q. Thank you. Attached to your declaration was a one page
18 exhibit. Can you describe that exhibit a little bit for me?

19 A. Sure.

20 Q. Would it be helpful if I gave you a copy of it?

21 A. Absolutely, just to refresh my memory. Thank you. The
22 exhibit attached just really just one line --

23 MR. WIN: Excuse me for one second. For the record,
24 I handed Mr. Glanz a document that was attached to his
25 declaration as Exhibit 1.

1 BY MR. WIN:

2 A. The exhibit is an extract, a report from the underlying
3 database, the Hold On Tracking. Just a bit of background which
4 I explained as well in the declaration, Hold On tracking
5 essentially is two pieces, the database that stored data and
6 then a software application that allowed users to access the
7 data to view the data and to modify it through their ordinary
8 business dealings. Post bankruptcy the system was shut down,
9 it was no longer in use and the database itself was maintained
10 by the estate for the purposes of research and having access to
11 those records. That database was, what we call, it's been put
12 into a read only mode so you couldn't modify the data, all you
13 could do is read from it and generate reports from the system.
14 The record that I provided here was the only information I was
15 able to find on the loan in question. It's a very brief
16 record, it doesn't state much. As I mentioned as well, the
17 system, you know, as Lehman grew, as the business grew, the
18 system itself was continually evolved and improved. In the
19 early 2000s, 2001, '02, '03, the system had, I would say a
20 somewhat more limited data than for example what you'd see in
21 the declarations that I provided for loans that were transacted
22 upon closer to petition date. And where that manifested itself
23 here specifically in the first data field showing the page
24 where it identifies the name of the buyer there was no record
25 kept in this system specifically who the buyer was. It just

Page 23

1 used the generic moniker, the street, which is meant to
2 identify any non-Lehman company. So all this record is really
3 th
4 telling you is that on December 30 of 2002, this loan was sold
5 and it was sold to a third party. The name of that third party
6 was not recorded in this system, and then there were no further
7 records maintained on this loan. Generally, once Lehman sold
8 the loan, it did not keep track of it, it had no relationship
9 to it and it just did not interact with that loan any further.

9 Q. So following the date of sale which is listed here as
10 December 30th, 2002, were you able to uncover any documents or
11 other evidence that would suggest that Lehman had anything else
12 to do with this loan?

13 A. No, I searched not only in this system but we have just
14 electronic archives that we maintain postpetition, did a search
15 for them for both the property address and the loan number, and
16 I was not able to locate any further documentation or any
17 further records.

18 MR. WIN: Thank you.

19 THE COURT: I have a question Mr. Glanz. Are there
20 any records regardless of whether it's with reference to this
21 loan that Lehman maintains that purport to connect the
22 insurance contracts or derivative contracts with mortgage loans
23 that had been originated by BNC at any time?

24 THE WITNESS: Not that I'm aware of.

25 THE COURT: All right. Thank you. Ms. Focht, do you

Page 24

1 have any questions you would like to ask of Mr. Glanz?

2 MS. FOCHT: Your Honor, I don't want to, I believe
3 that I misunderstood what was going on, but I could barely hear
4 him, I'll just say that and [indiscernible]. The court
5 reporter probably did and I can listen to it later on.

6 THE COURT: We're unable to hear you. We're unable
7 to hear you in a manner sufficient to record what you're saying
8 on the record of this hearing. Are you speaking on a regular
9 land line?

10 MS. FOCHT: Yes.

11 THE COURT: Can you please speak up as, I don't want
12 you to scream into your phone and I'm not suggesting that it's
13 your phone's fault, but our equipment here is not picking you
14 up very clearly.

15 MS. FOCHT: Thank you, Your Honor. I was wondering
16 if he said that there were no records. Is that what he was
17 saying, he had no records?

18 THE COURT: He's saying that the only records that
19 relate to your loan within the entire data entry system
20 maintained by Lehman Brothers is a one line statement which
21 reads, if you don't have it in front of you, buyer, the street,
22 that means the loan was sold to an entity, a financial
23 institution, or a securitization trust or some third party that
24 is not Lehman related, that's what that term, the street,
25 means. There's a loan I.D. number which is 107127821; there's

Page 25

1 an address, 530 Loral Road; there's a city, Nokomis, Florida;
2 there's a zip code, 34275; there's a servicer listed, Option
3 One Mortgage is the name of the servicer; there's a sold
4 settled date which is 12/30/02. And there's another line, the
5 last line it says lien position and it says one, I assume that
6 means it's a first lien mortgage. Is that right, Mr. Glanz?

7 MR. GLANZ: Correct, Your Honor.

8 THE COURT: All right. So that's the only
9 information that is available in the Lehman system. I also
10 asked Mr. Glanz a much more general question which was whether
11 regardless of whether we're talking about your loan, but
12 talking about all loans that may have been originated by BNC to
13 any and all borrowers that may have obtained financing through
14 that source, did Lehman Brothers maintain any records that were
15 identified as either insurance contracts or derivative contracts
16 that would be identified to a particular loan. And the answer
17 was no. That means based upon this inquiry that I'm satisfied
18 that there is no discovery to be had here because there are no
19 documents and I am satisfied that Mr. Glanz is a credible and
20 responsible witness who is able to provide information
21 concerning the records of Lehman Brothers.

22 Is there anything more that you, however, would wish
23 to ask Mr. Glanz?

24 MS. FOCHT: Yes, Your Honor, thank you. I am
25 bringing this up myself because I have completely different

Page 26

1 paperwork from another source down here in the state and it
2 doesn't name Option One and I'm just wondering is there another
3 person I can speak to who would have access to records and who
4 was providing records to Wells Fargo or Select Portfolio or any
5 other source regarding Fairbanks, Capital Corp, regarding
6 Aurora Loan Services, regarding Lehman Capital, which is a
7 division of Lehman Brothers Holdings Inc., and that would have
8 been dated as of December 1st, 2002 called a securitization
9 servicing agreement.

10 THE COURT: Mr. Glanz, do you understand the
11 question?

12 MR. GLANZ: I'm not entirely sure what the question
13 for me is, Your Honor.

14 THE COURT: Ms. Glanz, excuse me, Ms. Focht, do you
15 have the ability to travel to New York to participate in a
16 further hearing because I find that unless we're able to fix
17 our equipment that your participation by telephone is
18 insufficient for our purposes to be able to hear and respond to
19 what you have to say. I want you to have a full and fair
20 hearing, but I must tell you, I don't think that at least I'm
21 able to understand all that you're trying to do here. It may
22 be that you are seeking discovery unrelated to the bankruptcy
23 cases and if that's true, that's not anything you'll be able to
24 get through this bankruptcy court.

25 I also have an understanding that the property in

Page 27

1 question has been foreclosed, that you mentioned in your last
2 question the financial institution Wells Fargo. I understand
3 that Wells Fargo was a trustee for securitization trust that
4 ending up holding the mortgage that was originated by BNC. But
5 this witness is not in a position to talk about documentation
6 that belongs to other financial institutions, nor could any
7 witness from Lehman Brothers be in a position to talk about
8 such documentation. And I am frankly concerned that you may be
9 trying to use the bankruptcy process for a purpose that it is
10 not intended to be used for. It is not a means to obtain third
11 party discovery in connection with litigation claims that you
12 may in fact have against third parties. I make no comment with
13 respect to that. But this is probably the wrong forum in which
14 to pursue such objectives. Are you still there?

15 MS. FOCHT: Yes, I'm here.

16 THE COURT: Is there any other question? First of
17 all, maybe you can restate your question for Mr. Glanz in a way
18 that he can understand it, and then he can provide you with an
19 answer.

20 MS. FOCHT: Thank you. My questions is this. As I
21 stated they're down here collecting on the wrong
22 [indiscernible] this case is under appeal for many reasons. At
23 any rate, information that you provided to the Court is very
24 different than information that I was provided in discovery
25 down here, which is actually [indiscernible] and that is

Page 28

1 they're collecting on the wrong loan account and this is the
2 reason why I'm requesting discovery to find out [indiscernible]
3 what and when and according to what you're sending in as a
4 document it appears that it's showing multiple sales and I
5 provided evidence if you've seen the attachments where you're
6 also pointing out another Note Investor as Aurora, which I
7 found out is related to Lehman Brothers as well. Do you
8 understand?

9 MR. WIN: May I jump in here, Your Honor?

10 THE COURT: Why don't you say what you have to say.

11 MR. WIN: Sure. I think two things. I mean I think
12 first thing is that Lehman Brothers is not involved in the
13 foreclosure action in Florida. To the extent that Ms. Focht
14 believes that she has claims against the entities that are
15 involved in that action, she has a venue to raise those claims
16 which is the Florida foreclosure action.

17 And second, to the extent that she claims against
18 Aurora, Aurora is not a debtor and she's free to bring any
19 claims that she feels that she has against Aurora in the
20 appropriate state occur. But a claim against Aurora, even if
21 such a claim existed does not create a claim against Lehman
22 Brothers Holdings Inc. or BNC or any of the other debtors.

23 THE COURT: Let me add to what counsel just said.
24 Ms. Focht, you are not the only person who as a homeowner with
25 a mortgage that has gone into foreclosure, has sought to

Page 29

1 explore whether there was any recourse in this bankruptcy case.
2 There have been a handful, not many, a handful of other
3 individuals all over the United States, perhaps three, that
4 come to mind that have similarly sought to connect their
5 misfortunes as parties who got caught up in the mortgage crises
6 of the 2000s into some kind of right of action against Lehman
7 Brothers or Aurora. No one has been able to demonstrate a
8 connection between Aurora and LBHI because Aurora is a
9 subsidiary of LBHI that never went into bankruptcy. It's
10 simply not before this Court. And claims, if any, against
11 Aurora or against third party mortgage servicers have no place
12 in this bankruptcy court.

13 So to the extent that you have a complaint against
14 Wells Fargo or any other financial institution that may have
15 had some connection to the loan after it was sold in 2002, that
16 truly has nothing to do with this bankruptcy or any of the
17 debtors that are before this Court. And so if we were to have
18 a merit based discussion, you would lose, I regret to tell you.
19 Now let's deal with the claim.

20 MS. FOCHT: Your Honor, may I speak?

21 THE COURT: Excuse me?

22 MS. FOCHT: May I speak?

23 THE COURT: Of course.

24 MS. FOCHT: I don't want to, I don't think that your,
25 I don't think that these, I don't [indiscernible] the way that

Page 30

1 you said it. My claim here is someone has the record and has
2 not provided them, my second claim was someone is collecting on
3 the wrong loan account, and the attorneys on the other side
4 confusing the issue as if I'm running in here because I'm
5 fighting a foreclosure. I am not, they are down there
6 collecting on the wrong loan account. So but my other
7 statement was that I did not realize how much evidence I need
8 to put in all at once because it seems that [indiscernible] now
9 I'm going by what the state court down here is notating in one
10 of my orders and one of those orders was for me to file
11 [indiscernible] so this gets kind of confusing to me when I'm
12 being you know going back and forth trying to get these
13 records, trying to file [indiscernible] so I am doing that.
14 And I also [indiscernible] bankruptcy from BNC. Now I'm
15 hearing from you and I believe you are telling me I'm not
16 [indiscernible].

17 THE COURT: What I'm telling you is that based upon
18 the evidence that has been presented today, which points out
19 that there is no contract or derivative associated with this
20 loan that belongs to Lehman that can be tracked by Lehman, that
21 Lehman has any tie to whatsoever, not only with respect to this
22 loan but with respect to any other loans that were originated
23 by BNC. A proof of claim against LBHI that purports to be
24 based upon some unspecified liability associated with an
25 insurance contract or a derivative contract, fails to state a

Page 31

1 claim against LBHI that can be proven, and as a result I don't
2 believe there is any evidence that you could present that would
3 support that claim.

4 MS. FOCHT: [indiscernible]

5 THE COURT: I'm granting the objection as to this
6 particular claim, and we should now go to the BNC claim.

7 MS. FOCHT: Are you also objecting to my evidence of
8 the exhibit [indiscernible].

9 THE COURT: I don't know what you just said.

10 MS. FOCHT: Are you also objecting to the evidence
11 [indiscernible] that Lehman Brothers has taken the funds, my
12 funds, 109,000?

13 THE COURT: What evidence are you referring to?

14 MS. FOCHT: I had attached an exhibit, exhibit B to
15 my creditor amended response.

16 THE COURT: Well there are several responses. Maybe
17 counsel for Lehman can point me in the right direction.

18 MR. WIN: Are you referring to exhibit B which is the
19 document entitled loan disbursement instructions?

20 MS. FOCHT: Yes, Your Honor, that's it.

21 THE COURT: Counsel, can you comment with respect to
22 that document?

23 MR. WIN: Yeah. I mean I guess I have, I can
24 describe what the document looks like to me, and then I have a
25 question to Ms. Focht about her interpretation of this

Page 32

1 document. It's a document titled loan disbursement
2 instructions, and it looks to me like a document that a
3 mortgage originator would send internally in the Lehman case
4 from BNC to either Lehman Brothers Holdings Inc. or Lehman
5 Brothers Inc, it's not clear from the document, instructing the
6 entity in this case with the funds which would be Holdings or
7 LBI to disburse the loan to the borrower, which in this case
8 would be Ms. Focht. It's consistent with the amount of the
9 loan, which I understand to be around, approximately 10,000.
10 It looks like they started with that amount and then they
11 deduct it for title insurance, loan service, I mean sort of
12 basic origination fees. And then at the bottom, there's the
13 amount that was actually transmitted to Ms. Focht. But what
14 I'm hearing Ms. Focht say suggests that she's alleging that she
15 actually in taking out a loan gave Lehman Brothers money which
16 doesn't make a whole lot of sense. So I guess I'm a little
17 confused by that.

18 Ms. Focht, is that what you're stating that you paid
19 BNC or LBHI \$110,000?

20 MS. FOCHT: Yes. This money came from me at the
21 closing [indiscernible] reference to Lehman Brothers.

22 MR. WIN: So at a closing of a loan transaction where
23 you were the borrower, you paid the entity \$110,000?

24 MS. FOCHT: Yes, Your Honor, and I received a problem
25 [indiscernible] 2007 is when I realized they're collecting on

Page 33

1 the wrong loan, and instead of settling this matter with me,
2 they send an investigation letter which they never did anything
3 with instead filed a foreclosure behind my back, so I was stuck
4 trying to get what was going on. I didn't know about Wells
5 Fargo, I never heard of Wells Fargo, they were the ones at the
6 foreclosure, I can't find anything valid with them. And at any
7 rate --

8 THE COURT: Ms. Focht, let me ask you a question. I
9 don't mean to interrupt you. Was this loan from BNC a loan
10 that you took out in connection with the original purchase of a
11 home or was it a refinancing?

12 MS. FOCHT: On this particular one this was the
13 purchase of a home.

14 THE COURT: Was the purchase of a home.

15 MS. FOCHT: Yes.

16 THE COURT: And how much equity did you put down on
17 the home?

18 MS. FOCHT: At the closing I provided them with close
19 to \$110,000, that's all I remember, I was in an accident I was
20 brought into this, rushed into this [indiscernible] you know
21 suffer from post traumatic stress disorder which I still have
22 [indiscernible].

23 THE COURT: I'm going to make a suggestion. This is
24 an unusually difficult hearing because the individual most
25 affected by it, Deborah Focht, is participating from Florida by

Page 34

1 telephone on a telephone line that is not coming through as
2 clearly as it might, and there are a number of facts being
3 alleged by Ms. Focht as a witness even though she is not
4 physically present in Court for me to judge her demeanor and
5 she also has not been sworn to tell the truth.

6 To some extent what she is saying relates to personal
7 recollection, to some extent it relates to documents. The
8 record I find is unclear with regard to much of what she is
9 saying to me or trying to explain. I believe that it may be of
10 some value for Ms. Focht to have her deposition taken or for
11 her to appear in person at her expense to participate in a
12 hearing in which she will be able to present her case as a live
13 witness, with or without counsel. I would note that as a lay
14 witness and as a party who is apparently preparing documents on
15 her own, perhaps with the assistance of a lawyer, that it is
16 very, very difficult for me to follow precisely what she is
17 saying.

18 And the last question and answer from counsel which
19 elicited the statement that this witness believes that she paid
20 Lehman directly or indirectly \$110,000, if that's the right
21 number, to me sounds preposterous. But it may be true, I have
22 no way of knowing. It sounds as if it may be money paid in
23 connection with the acquisition of real property as the down
24 payment, the mortgage financing being part of the purchase
25 price, but I don't know if that is true, I don't know what the

Page 35

1 transactional relationship might be. For that reason, I would
2 urge that counsel for LBHI and BNC in this matter endeavor to
3 find out with greater clarity in a manner that the Court can
4 actually evaluate it, what this witness is actually saying
5 because I truly don't understand it. And Ms. Focht, I have
6 been sitting as the bankruptcy Judge in the Lehman Brothers'
7 case for over four and a half years, and this is about the most
8 confusing hearing I have had in all that time.

9 MS. FOCHT: Sorry.

10 THE COURT: I'm just telling you that it's not clear
11 to me what you're saying, what you want and the basis for it.
12 I'm also telling you that as a homeowner in Florida whose
13 mortgage ended up in a securitization pool, and who ended up in
14 foreclosure, you are one of millions of Americans who ended up
15 having their home loan mortgages originated by an originator
16 and then having the loans sold into a securitization facility
17 and then because of an inability to service the mortgage, ended
18 up in foreclosure. I am sympathetic and I'm sorry that
19 happened to you, but that has nothing to do with LBHI. LBHI is
20 the parent company in this bankruptcy case of a number of
21 affiliates, some in bankruptcy, many, many not in bankruptcy.
22 And one of those affiliates happens to be Aurora Bank, an
23 entity that I have heard about through this bankruptcy case,
24 but it is not a debtor, and as a result it is not before this
25 Court.

Page 36

1 We need to get to the bottom of this. If in fact
2 your proof of claim relates to money that you believe you gave
3 to Lehman Brothers, that is a very different fact pattern from
4 the one that I believe I have analyzed. What I believe I have
5 analyzed is that you borrowed money from a mortgage originator,
6 in this instance, BNC, that you alleged generally that the
7 transaction at the time was for reasons not clearly specified
8 to me fraudulent or improper or in some manner actionable by
9 you, and you have then sought to find avenues of liability
10 throughout the Lehman family even though the BNC loan was sold
11 many years ago into a securitization vehicle that has zero
12 connection to any Lehman entity.

13 If the facts are as I have described them, you have
14 no basis to pursue any claim in this bankruptcy case. If the
15 facts are different you may have a basis to pursue a claim in
16 this bankruptcy case. I need to know those facts before I can
17 take further action with regard to the two remaining proofs of
18 claim. So we'll have further proceedings another day or this
19 will be resolved by agreement. We're adjourned.

20
21 (Proceedings concluded at 11:01 AM)

22
23
24

25

Page 37

1 I N D E X

2

3 RULINGS

4 DESCRIPTION PAGE

5 HEARING re Doc #36007 - Four Hundred Third

6 Omnibus Objection to Claims

5

7

8

9 HEARING re Doc #34303 - Plan Administrator's

10 Omnibus Objections to Claims filed by

11 Deborah Focht

15 (partial)

12 Second part cont'd

13

14

15

16

17

18

19

20

21

22

23

24

25

Page 38

1 CERTIFICATION

2 I, Theresa Pullan, certify that the foregoing is a
3 correct transcript from the official electronic sound recording
4 of the proceedings in the above-entitled matter.

5

6 AAERT Certified Electronic Transcriber CET**00650

7 Theresa Pullan

8 April 26, 2013

9 Revised May 23, 2013

10

11

12

13

14

15

16

17

18

19

20

21

22 Veritext

23 200 Old Country Road

24 Suite 580

25 Mineola, NY 11501